

**Rhode Island Water Resources Board**  
**WATER ALLOCATION PROGRAM ADVISORY**  
**COMMITTEE MEETING**

**Meeting Proceedings**  
Thursday, December 19, 2002

Mr. M. Paul Sams, General Manager of the RI Water Resources Board (Board) opened the meeting and welcomed those in attendance. He introduced Mr. Dale Thompson, Visiting Assistant Professor of Law, Roger Williams University School of Law. Mr. Thompson has been leading the Water Rights/Regulatory Authority Committee Code.

**1. REGULATED RIPARIANISM MODEL WATER CODE**

*Presentation by Dale Thompson, Roger Williams University School of Law*

Mr. Thompson introduced the Code pointing out that his presentation is not intended to imply that the Code should be adopted, necessarily, but used as a tool to understand the issues. He felt that commentary and legal citations in the Code are particularly useful. Mr. Thompson stated that to the best of his knowledge, the Code has not been adopted in its entirety by any state. However, different sections have been adopted by various states.

Mr. Thompson gave a brief summary of topics covered in various chapters. The first chapter contains underlying themes, broad definitions, and concepts of water quality and quantity. The basic rule governing the use of water in the Code is the determination of whether the use is reasonable. The Code also contains administrative guidance regarding comprehensive allocation planning and the use of fees. Chapter Six covers the permitting process, requirements of permits and priorities during shortages and emergencies. The permitting process is similar to that of zoning, in that it is the regulation of an existing property right. The Code is very specific about what should be included in the permitting process.

In summary, the Code requires that the use is reasonable, does not exceed safe yield and does not conflict the allocation plan. Water quality and quantity are linked and concepts include the potential for combining quality and quantity permitting processes. Preference standards among water rights are established for times of shortage, drought and emergency. Conservation is a central theme and is tied to fee structures during shortages and emergencies to correlate the amount of water available with its highest use. In summary, the Code will provide a framework for development of a water allocation program. See [\*Outline Attached\*](#).

Chapter Seven addresses the scope of the water right and discusses the modification of water rights in depth. The term modification includes

transfers and sales. There are recommendations for procedures to use if the user changes the use of the water. Part three talks about restrictions due to shortages. Preference standards among water rights are established for times of shortage, drought and emergency. Conservation is a central theme of the Code in general and is tied to fee structures. During shortages and emergencies, provisions of the Code seek to use all available information and to coordinate the amount of water available with its highest valued use or most important uses as determined previously. Chapter Eight is more of a special case that establishes procedures for a multijurisdictional transfer. This section is probably more important for larger states and not as relevant here in Rhode Island. Chapter Nine focuses on water supply conservation and augmentation.

In summary, the Code will provide a framework for the committees as we explore the development of a program and research the issues. Sub committees may want to focus on some of the provisions and ask whether this is the way we want to go in Rhode Island? Are these the right priorities? Do we want to be more specific? Do we want to change the priorities?

### **Discussion**

Mr. Ward requested more information about the fees and how they are addressed in the Code.<sup>1</sup> Mr. Thompson said that the Code is not as specific as it could be on the exact structure of the fees. He felt that the committees may need to explore the various options tied to quantities, classes of use and time of year. The Code does not speak specifically to the structure or amounts. In the West, fees were often set too low. There were problems with waste. California faces a deadline of December 31 to reduce their withdrawals on the Colorado River. They have attempted to initiate negotiation between farmers who are paying around \$2.00 per acre-foot and cities that are paying \$200.00 per acre-foot. The negotiations completely failed partly because the fees were set too low. While an ideal fee is not clear, in general the West has run into trouble when fees went below \$20. Problems were reduced with fees above \$20. In general, the Code views the

---

<sup>1</sup> Note: The following summary is excerpted from the ASCE website ([www.asce.org](http://www.asce.org)). The purpose of the Model Water Code Project of the American Society of Civil Engineers (ASCE) was to develop proposed legislation for adoption by state governments for allocating water rights among competing interests and for resolving other qualitative conflicts over water. To this end, input was procured from a variety of people involved with water-related issues such as engineers, government administrators, lawyers, business people and academics. Due to the continued divergence among the water laws of eastern and western States, the development of a single Code appropriate for all the States was not possible. In the end, two different Model Water Codes had to be prepared. This one, *Regulated Riparian Model Water Code*, reflects the needs and legal traditions of the eastern States. Since regulated riparian statutes allocate the right to use water on the basis of whether the use is "reasonable," this Code follows this pattern for the allocation of the waters of a State. This Code also addresses the difficult question of multijurisdictional transfers of water, whether across a water basin boundary or across a state line.

waters as the general property of the residents. The state sells the water to the users and money generated should go back to the state. Ms. Karp felt that according to Rhode Island law water is a resource rather than a commodity and that Chapter 2: No Prohibition Based on Location of Use, noting that this would represent a radical change in the law. Mr. Thompson explained that Chapter 2 is intended to address transfers during drought that previously were not allowed at all. Out of basin transfers can be important in alleviating problems during extreme drought. This section enables that process. Other sections address out of basin transfer issues in more detail. Mr. Reitsma stated that he was not as concerned about whether or not there will be a need to change state law noting that the Code allows plenty of opportunity to decide on the appropriate amount of regulation. He asked whether the Code or its commentary considers a requirement for alternatives analysis as part of the permit application for decision by an agency. He stated that the reason he asked the question was to require it up front rather than putting the burden on the reviewing agency. This process makes it easier to reach a decision and to minimize impacts. Regarding watersheds, he suggested that an allocation program should build in an incentive for watershed management and watershed protection plans. In response, Mr. Thompson stated that the Code explicitly places the burden on the applicant in several places but was not clear on whether alternatives analysis was specifically mentioned. He agreed in principle that watershed management should be central to an allocation program.

Ms. Marks suggested it would be useful to look at effluents and their sources. Mr. Meyer cautioned the group regarding water fees and using western law to evaluate options. He felt that the discussion must involve the Code as a jumping off point; however, the committees will need to evaluate potential directions based on what is going on in Rhode Island. He stressed the need to use the Code as a starting point, a framework to wrestle with the issues. Mr. Thompson agreed with Mr. Meyer, stating that some provisions may be useful and some may not be appropriate for Rhode Island at all. Ms. Scott suggested that merely preventing excessive degradation is not consistent with the Clean Water Act, that the language implies that some degradation is acceptable. In response, a distinction was made between those provisions that apply to times of shortage and those that apply during normal times. Reference to minimum flows in the Code were discussed as having primacy during normal times and any allocation of minimum levels would consider the priorities that are established in the Code during times of shortage or emergency. Mr. Ward asked where the model came from and how old it was. Mr. Thompson stated that it was developed by a team of legal experts and was less than ten years old [published in 1997]. Mr. Ward asked about the connections to the Clean Water Act. Mr. Thompson stated that the model Code is more geared to quantity and allocation decisions but that several sections make the connections between water quality and quantity. Those chapters address the quality issues in efforts to be consistent with the Clean Water Act. Mr. Ward stated his questions were prompted by section 6R-3-04, Preferences Among Water Rights, that establishes three priorities without reference to or

acknowledgement of the environment or stream flow. Mr. Thompson stated that those are the preferences that are established when you have restrictions. Previously in the Code the section that establishes the procedures to get a permit (6R-3-02) speaks to the environment and the important purposes there. Those are the requirements to get the permit in the first place. Essentially those Clean Water Act and environmental purposes are built into the initial decision to award the permit. When it comes to water shortages, which is the primary purpose of 6R-3-04, the Code establishes priorities for allocating the remainder of the water contained in the resource and what must be maintained to meet the minimum stream flows. Thus, this section establishes priorities within the quantity minimums that have been established with consideration of environmental interests and then allocates the difference among the human uses that are ranked in terms of importance. Mr. Bettencourt stated that adopting the Code would require a change in state law. He asked a question about due process and property takings. Mr. Thompson said that in states that have adopted portions of the Code and have moved toward regulated riparian systems those legal challenges have not been successful. He added that the Water Rights Committee will be exploring this important issue in more detail.

Mr. D'Ovidio summarized the value of using the Code again stating that it was not the intent to adopt the Code in its entirety in order to clarify and alleviate concerns. Throughout the model document, there is valuable commentary that explains the root of the ideas. There is, in fact, more commentary than Code. References to the Clean Water Act, wastewater effluent and other sections address issues raised during discussion. He noted in particular that commentary references the Clean Water Act. It is important as a tool to keep us from reinventing the wheel but at the same time, it is important to use caution to adapt provisions that are appropriate for Rhode Island. Mr. Lefebvre agreed that it was important to understand the Rhode Island context. He described the range of water resources and suppliers, adding that not all permits are equal. They range from very large water users to individual ISDS permits.

## 2. **COMMITTEE REPORTS AND DISCUSSION**

Alicia Good stated that the Stream Flow Standards Committee devoted a considerable amount of time to a discussion of the mission. She felt that the presentation on efforts in other states by Ralph Abele of the EPA and the mission statement exercise have been worthwhile.

Julia Forgue stated that the **Out-of-Basin Transfer** Committee continues to refine its mission and focus. Two immediate tasks are to identify critical basins and define out of basin transfers. Problems from consumptive use include both inter and intrabasin transfers. The committee has identified the need for graphic presentations to portray where the problems are arising. They are looking at existing agreements between suppliers.

Guy Lefebvre stated that the **Joint Advocacy and Funding Committee** engaged in eloquent discussions about housing, economics, and water in relation to average household income. A copy of the Water Investment Act was distributed so that the committee can keep an eye on federal initiatives.

John Bell stated that the **Water Rates, Fees and Alternatives Committee** is exploring a statewide Demand Side Management (DSM) charge similar to the electric industry's DSM program. Funds could be managed by a central agency such as the Water Resources Board. For their next meeting they have scheduled a guest speaker from Energy New England.

Dale Thompson stated that in addition to the Code, the **Water Rights/Regulatory Authority Committee** discussed public trust and property rights.

John O'Brien stated that the **Priority Uses Committee** adopted a mission statement and reviewed Chapter Six of the model Code. They had reached some consensus. He noted that, taken out of context, the Code's priority uses may not speak to the environment. Mr. Combs asked that the mission statement and objectives appear in their entirety and read the detailed language.

Anne Veeger stated that the **Registration and Research Committees** continue to focus on water use in Rhode Island and water allocation programs in other states. They spent one meeting ironing out the differences between the two committees.

On behalf of Juan Mariscal, Liz Scott summarized the work of the **Integrated Water/Wastewater Committee**. They discussed the importance of looking at the full water cycle, the plumbing code and enforcement issues. They agreed that recruiting pretreatment operators would result in more ideas for opportunities for greater water efficiency. They agreed that good success stories may be beneficial to highlight.

On behalf of Beth Ashman Collins and Sandra Whitehouse, Connie McGreavy summarized the work of the **Impact Analysis, and Education/Outreach and Public Relations Committees**. She noted that the Education Committee will focus on getting the word out to potential new members of the Water Allocation Program Advisory Committee and emphasized the need for professional public relations assistance.

### **3. MISSIONS, GOALS AND TASKS**

RI Water Resources Board staff reviewed the task list that was developed based upon meeting proceedings in each of the committees. The goal is to refine the task lists and missions for each committee to serve as the basis of

the work plan for the full Committee. Board staff continues to assist committees with the process.

Mr. Reitsma expressed some concern about the need to strategically focus on time frames and what will be accomplished. He acknowledged that the group should not jump to conclusions, but instead, fully explore the issues and become educated in order to produce timely, appropriate, recommendations. Mr. Reitsma, Ms Doerner, Mr. Ward, Mr. Donahue, Ms. Karp and Mr. Dzykewicz agreed to develop a final overall mission and purpose statement.

Mr. Sams thanked Board staff for their hard work and Mr. Dale Thompson for his excellent presentation. He extended his appreciation to those attending for their continued commitment to the program.

Respectfully Submitted,

Kathleen Crawley  
Supervising Planner, Rhode Island Water Resources Board

# **Attachment to the Water Allocation Program Meeting Proceedings**

**December 19, 2002**

## **Brief Guide to the Regulated Riparian Model Water Code**

*Presentation by Dale Thompson, Roger Williams University School of Law*

### **I. Chapter 1: Declarations of Policy**

- A. Very broad policy interests
- B. Public interest definition
  - 1. Sees waters of state as resource owned by state in trust for public
  - 2. This is not equivalent to the public trust doctrine
  - 3. More that water is a resource that must maintain some public control, via regulation in the public interest
- C. Importance of efficient and productive use of water
  - 1. Many types of uses included in this focus
  - 2. Role of both efficiency and equity during shortfalls
  - 3. Legal security for water rights
  - 4. But, parties themselves may voluntarily modify or sell rights, subject to protection of 3<sup>rd</sup> parties
  - 5. Regulation of interbasin and interstate transfers
- D. Quantity/quality interaction
  - 1. Should this be done by single agency?
- E. Encouragement of Conservation
- F. Maintenance of Minimum flows
- G. Recognition of local interests

### **II. Chapter 2: General Provisions**

- A. Basic rule: use is allowed only if it is Reasonable
- B. No prohibition based on location of use: ok if used on nonriparian or nonoverlying land
  - 1. This is big change from prior common law riparian reasonable use
  - 2. Also, big change from American reasonable use groundwater doctrine
- C. No unreasonable injury to other water rights
- D. Regulation of rights
  - 1. Rights themselves have protection as property
  - 2. But State can regulate these property rights in public interest
  - 3. Courts have unanimously ruled that this regulated riparian system is not a taking in moving from a traditional riparian system
  - 4. Exempted uses covered by reasonable use doctrine
- E. Definitions
  - 1. Various ones
  - 2. Reasonable Use: use of water as is necessary for economic and efficient use, without waste, without unreasonable injury to others, and in the public interest

### III. Chapter 3: Waters Subject to Allocation

- A. All waters, with exception, subject to allocation
- B. Transboundary waters, and small sources exempted
- C. Protected minimum flows (these minimums are not allocated)

### IV. Chapter 4: Administration

- A. State Agency & its powers
- B. Funding & authority
- C. Fees
  - 1. Application fees
  - 2. Water use fees
- D. Planning responsibilities
  - 1. Comprehensive Allocation Plan
  - 2. Drought management strategies
  - 3. Statewide data
- E. Coordination with other branches & levels of government

### V. Chapter 5: Enforcement & Dispute Resolution

- A. Rights to hearings, except frivolous claims
- B. Dispute resolution
- C. Judicial review
- D. Civil enforcement (notice of violations, penalties)
- E. Criminal enforcement

### VI. Chapter 6: Establishing a Water Right

- A. Permit required for withdrawal of water
  - 1. Permit requirement does not create or destroy property rights
  - 2. Simply is regulation of existing right
  - 3. Similar to zoning of land uses
  - 4. But even more special public nature of water resources - regulation can be extended even further
  - 5. Small withdrawals are exempted
  - 6. May register withdrawals that are not subject to permits
- B. Permit procedures
  - 1. Content of a permit
  - 2. Procedures on notice, contest of permit
- C. Basis of water right
  - 1. Standards
    - a. Proposed use is reasonable
    - b. Withdrawal not exceed safe yield
    - c. Consistent with allocation plan
  - 2. Determining whether use is reasonable: 6R-3-02



- a. Various factors recommended
  - b. State can chose own factors
- 3. Preferences among water rights: 6R-3-04 [same considerations as 6R-3-02]
- 4. Prior investment in facilities to use or withdraw water is irrelevant to permit decision
- 5. Standards for interbasin transfers

D. Coordination of water allocation and water quality regulation

- 1. Allocation and transfer decisions done in manner to protect quality
- 2. Permits may combine quantity and quality terms

VII. Chapter 7: Scope of the Water Right

- A. Permit Terms & Conditions
- B. Modification of water rights / permits
- C. Restrictions during Water Shortages (Part 3)

VIII. Chapter 8: Multijurisdictional Water Transfers

IX. Chapter 9: Water Conservation & Supply Augmentation